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Supreme Court, U.S.
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No. 93-675

In The

Supreme Court of the United States

October Term, 1993

CYNTHIA KELLEY, INDIVIDUALLY AND ON BEHALF OF HER MINOR CHILDREN JERRED SETH KELLEY AND CINDY LYNN KELLEY,

Petitioners,

vs.

INDUSTRIAL REFRIGERATED SYSTEMS, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. The decision of the Fifth Circuit Court of Appeals, affirming summary judgment in favor of Industrial Refrigerated Systems, does not present issues warranting exercise of this Court's supervisory review since the decision is not in conflict with those of other circuits and accurately applies Louisiana law regarding the duties of a retail seller.

II. The Fifth Circuit correctly affirmed the trial court's summary judgment in favor of respondent, Industrial Refrigerated Systems, since, as a matter of law, Industrial Refrigerated Systems did not have a duty to warn Jack Kelley regarding the potential danger of the ice machine at issue since any danger presented by the ice machine's auger was open and obvious.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Statutory Authority	1
Statement of the Case	2
A. Course of Proceedings and Disposition in Court Below	2
B. Statement of the Facts	6
Summary of the Argument	7
Reasons for Denying the Writ	8
I. The decision of the Fifth Circuit Court of Appeals, affirming summary judgment in favor of Industrial Refrigerated Systems, does not present issues warranting exercise of this Court's supervisory review since the decision is not in conflict with those of other circuits and accurately applies Louisiana law regarding the duties of a retail seller.	8
II. The Fifth Circuit correctly affirmed the trial court's summary judgment in favor of respondent, Industrial Refrigerated Systems, since, as a matter of law, Industrial Refrigerated Systems did not have a duty to warn Jack Kelley regarding the	

Contents

Page

potential danger of the ice machine at issue since any danger presented by the ice machine's auger was open and obvious. 11

A. Both the District Court and the Court of Appeals Properly Used Summary Judgment in this Case. 11

B. As a Retail Seller, Industrial Had No Duty to Warn Jack Kelley of the Auger's Obvious Danger. 14

Conclusion 18

TABLE OF CITATIONS

Cases Cited:

American v. Duo Fast Dixie, 367 So. 2d 415 (La. App. 4th Cir. 1979) 9, 14

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2501, 91 L. Ed. 2d 202 (1986) 12

Braxton v. United States, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991) 9

Chappuis v. Sears Roebuck & Co., 358 So. 2d 926 (La. 1978) 9

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986) 12

Contents

Page

Davidson v. Stanadyne, Inc., 718 F.2d 1334 (5th Cir. 1983) 11

Decote v. Liberty Mut. Ins. Co., 451 So. 2d 1211 (La. App. 4th Cir. 1984), *writ denied*, 457 So. 2d 15 (La. 1984) .. 15

Delanzo v. ABC Corp., 572 So. 2d 648 (La. App. 5th Cir. 1990) 9, 14

Erie R.R. v. Tompkins, 304 U.S. 64, 56 S. Ct. 817, 82 L. Ed. 1118 (1938) 8

Halphen v. Johns-Manville Sales Corp., 484 So. 2d 110 (La. 1986) 14, 15, 17

Harris v. Pizza Hut, 455 So. 2d 1364 (La. 1984) 11, 14

Home Ins. Co. v. National Tea Co., 577 So. 2d 65 (La. App. 1st Cir. 1990), *aff'd in part, rev'd in part on other grounds*, 588 So. 2d 361 (La. 1991) 14, 15

Hopper v. Crown, 555 So. 2d 46 (La. App. 1st Cir. 1989), *rev'd*, 558 So. 2d 1117 (La. 1990) 14, 15

Johnson v. Hartford Ins. Co., 623 So. 2d 35 (La. App. 1st Cir. 1993) 16

Kelley v. Industrial Refrigerated Systems, Inc. 992 F.2d 1408 .....2, 5, 8, 12, 14, 17

LeBleu v. Home Light Div. of Textron, Inc., 509 So. 2d 563 (La. App. 3d Cir. 1987) 15

Contents

Page

Lavespere v. Niagara Mach. & Tool Works, 910 F.2d 167 (5th Cir. 1990) 12, 13

Lovell v. Earl Grissmer Co., 422 So. 2d 1344 (La. App. 1st Cir. 1982), *writ denied*, 427 So. 2d 871 (1983) 15

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2ds 538 (1986) ... 12

Melton v. Deere & Co., 887 F.2d 1241 (5th Cir. 1989) 13, 17

Nelton v. Astro-Lounger Manufacturing Co., 542 So. 2d 128 (La. App. 1st Cir. 1989) 14

Putnam v. Gulf States Utilities, 588 So. 2d 1223 (La. App. 1st Cir. 1991) 11, 16

Reid v. State Farm Mut. Auto Ins. Co., 784 F.2d 577 (5th Cir. 1986) 12

Sperry-New Holland v. Prestage, 617 So. 2d 248 (Miss. 1993) 15

Spillers v. Montgomery Ward & Co., 294 So. 2d 803 (La. 1974) 14

Thornhill v. Black, Sivalls & Brison, Inc., 394 So. 2d 1189 (La. 1981) 9, 13, 15

Trevino v. Yamaha Motor Corp. 882 F.2d 182 (5th Cir. 1989) 11

Contents

Page

Walker v. Sears, Roebuck & Co., 853 F.2d 355 (5th Cir. 1988) 12

Winterrowd v. Travelers Indem. Co., 462 So. 2d 639 (La. 1985) 16

Statutes Cited:

La. Civ. Code art. 2545 ..... 1, 14

La. R. S. 9:2800.51, *et seq.* 15

La. R.S. 9:2800.57 1

La. R.S. 9:2800.57(B)(2) 15

28 U.S.C.A. 1292(b) 4

Rules Cited:

Federal Rules of Civil Procedure:

Rule 54(b) 13

Rule 56 4

Rule 56(c) 12

Uniform Local Rule 2.07E 4

Supreme Court Rule 10 ..... 7, 9

STATUTORY AUTHORITY

Art. 2545. Liability of seller for concealment of vice.

> The seller, who knows the vice of the thing he sells and omits to declare it, besides the restitution of price and repayment of the expenses, including reasonable attorney's fees, is answerable to the buyer in damages.

La. Civ. Code Art. 2545 (West Supp. 1993).

§ 2800.57. Unreasonably dangerous because of inadequate warning.

> B. A manufacturer is not required to provide an adequate warning about his product when:
>
> (1) The product is not dangerous to an extent beyond that which would be contemplated by the ordinary user or handler of the product, with the ordinary knowledge common to the community as to the product's characteristics; or
>
> (2) The user or handler of the product already knows or reasonably should be expected to know of the characteristic of the product that may cause damage and the danger of such characteristic.

La. R.S. 9:2800.57 (West 1991).

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below

At this stage of the proceedings, respondent, Industrial Refrigerated Systems, Inc. ("Industrial"), has obtained both a jury verdict and a summary judgment in its favor. Additionally, the summary judgment in its favor was affirmed by the Fifth Circuit Court of Appeals as reported at 992 F.2d 1408. Subsequently, the petitioner's Petitions for Rehearing and for En Banc consideration were denied.

This suit arises out of an accident which occurred on July 5, 1987, at the Demere Ice Company's ice plant in Leeville, Louisiana. Cynthia Ann Kelley, the surviving spouse of Jack Kelley, filed suit individually and on behalf of her minor children, naming, among others, Industrial as a defendant. On the date of the accident, Mrs. Kelley's husband, Jack Kelley, was fatally injured when he became entangled in an ice auger located inside of an ice storage bin manufactured by Price-Macemon/Rochester Silo, Inc.[1]

Petitioner filed this action on July 1, 1988, naming several defendants, including Industrial, the retail seller of the ice-making equipment. However, prior to trial, all other remaining defendants

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1. Petitioner has attached gruesome photographs of Jack Kelley as Appendix K (A-90-91) solely for the purpose of inflaming the court since the attached photographs were not admitted into evidence at trial, nor were they made part of the petitioner's opposition to the motion for summary judgment, and have little or no probative value. Additionally, the photograph submitted by the petitioner as A-55, Appendix D, was not an accurate depiction of the inside of the storage bin and the auger at the time of the accident, had no supporting testimony at the trial, was never discussed at the trial, was never offered into evidence and therefore was never admitted into evidence. It was first mentioned by petitioner in post-trial briefs. In fact, petitioner was admonished by the Fifth Circuit at oral argument for including the photographs as part of his brief to that court since the photographs were not part of the record.

were dismissed with the exception of Rochester Silo. The action against Rochester Silo, the successor in interest to Price-Macemon, was severed due to that company's bankruptcy. Price-Macemon had manufactured the ice-making equipment at issue.

The trial of this matter began on October 7, 1991. At trial, the petitioner claimed that Industrial was the *manufacturer* of the ice plant or, alternatively, was liable as a *retailer seller* for failing to supply warnings or limit switches in connection with the sale of the ice-making equipment. After three days of testimony, the jury *unanimously* concluded that Industrial was a retail seller, not the "manufacturer" of the ice plant. In addition to not having actually manufactured the equipment, the jury concluded that Industrial did not assemble the equipment, vouch for the product by holding it out as its own, or act as a professional vendor or merchant. The jury also found in favor of Industrial on the issue of seller liablity concluding that it was not negligent in performing any of the duties of a retail seller. (R. 1182).

The district court entered a judgment in accordance with the jury's verdict on October 11, 1991. (R. 1252). Subsequently, on October 21, 1991, the petitioner filed a Motion for Judgment Notwithstanding the Verdict or Alternatively, for a New Trial. In her motion for new trial, the petitioner argued that Industrial was, in fact, a "manufacturer." Second, the petitioner urged the court to grant the motion on its own initiative. (R. 1153). Industrial filed a timely opposition to the Motion for Judgment Notwithstanding the Verdict or Alternatively, for a New Trial. (R. 1798). In granting the petitioner's motion for new trial, the district court found "that the jury may not have had an adequate explanation of the duty to warn imposed upon a seller in Louisiana." (R. 1765-71).

Arguing that the trial court abused its discretion granting the petitioner a new trial, Industrial filed a Motion to Amend the Interlocutory Order, requesting the trial court to amend its order to

certify the order for permissive appeal under 28 U.S.C.A. § 1292(b). The district court denied that motion. (R. 1738-40). Subsequently, a writ of mandamus was filed with the Fifth Circuit Court of Appeals, which was denied.

In preparation for the new trial, respondent timely filed a Motion for Summary Judgment on April 10, 1992, alleging that, under Louisiana law, Industrial was entitled to be dismissed from the suit under Rule 56 of the Federal Rules of Civil Procedure, in part, because Industrial did not breach any duty to warn of the ice auger's open and obvious danger. (R. 1671-94). The motion was noticed for hearing on April 29, 1992, at 10:00 a.m. (R. 1672). After petitioner's counsel failed to file an opposition as required under Uniform Local Rule 2.07E, the court reviewed the respondent's motion, found it to have merit, and granted the motion for summary judgment on April 22, 1992. (R. 1667-68).

Petitioner's counsel subsequently filed a Motion for Reconsideration on April 28, 1992, and, as requested by the trial court, included an opposition to the motion for summary judgment. (R. 1602). Industrial filed a timely opposition on May 4, 1992, urging that the petitioner was not entitled to reconsideration and that the motion for summary judgment was properly granted *on the merits*. (R. 1593). The trial court denied the petitioner's motion for reconsideration, finding that petitioner's counsel's excuse for failing to timely oppose the motion — that he was on a "combination vacation/brief-writing" trip — was not sufficient to warrant reconsideration. (R. 1570-73). Significantly, however, the court actually reconsidered the motion stating that it considered the "merits of the plaintiff's motion for reconsideration and, in an abundance of caution, again considers defendant's motion for summary judgment on the merits with the benefit of plaintiff's opposition." (R. 1569).

Further, in deciding to grant the motion for summary

judgment, the trial court noted that "[i]n granting a new trial, the court sought to correct what it perceived to be a manifest injustice from occurring by providing the plaintiff's counsel a second opportunity to prove liability against the remaining defendant." (R. 1575). However, the court "reluctantly [admitted] that a less impassioned review of the evidence in the matter does not support plaintiff's position." (R. 1580). Finding that the auger presented an open and obvious danger against which Industrial had no duty to warn, the trial court concluded that there was no material issue of fact in dispute to prevent summary judgment as a matter of law. Therefore, "even upon a consideration of defendant's motion on the merits," petitioner's counsel failed to bring forth any facts which would raise "a triable issue." (R. 1580). Thus, the court entered judgment in favor of Industrial.

To challenge the summary judgment, petitioner's counsel appealed the trial court's order denying the motion for reconsideration and affirming the summary judgment in favor of Industrial. (R. 1562). Industrial cross-appealed from the initial order granting a new trial following the jury's verdict in its favor. (R. 1560).

In a well-reasoned opinion dated June 15, 1993, the Fifth Circuit Court of Appeals reviewed Louisiana law on seller liability and concluded that the danger of the auger in this case was obvious, relieving Industrial of any duty to warn of dangers of which the user was or should have been aware. Since "Industrial's tort liability as the *seller* of the ice plant must arise, if at all, from its failure to warn of this dangerous condition", the court held that Industrial was "entitled to Judgment as a matter of law." *Kelley*, 992 F.2d at 1418 (emphasis in original).

Because the Fifth Circuit's decision accurately applies Louisiana law regarding the duties of a retailer seller, this Court should refuse to grant petitioner's Petition for Writ of Certiorari.

B. Statement of the Facts

On July 5, 1987, Jack Kelley was fatally injured as he was working at the Demere Ice Company's ice plant in Leeville, Louisiana. On the date of the accident, Jack Kelley and a co-worker were bagging ice at the ice plant. In an attempt to quickly get ice out of the ice storage bin, Mr. Kelley climbed into the ice storage bin through one of the service doors, disregarding his employer's orders never to enter the bin. (R. Vol. 10, pp. 180-181). While climbing into the bin, Mr. Kelley passed the bin's control panel. (R. Vol. 8, p. 50). However, he chose not to press the button to stop the auger. While inside the ice storage bin, Mr. Kelley became entangled in the ice auger that dispenses the ice into the ice conveyor.

Industrial acted as a broker in ordering specified ice-making equipment from Turbo Refrigeration Company and in ordering an ice storage bin from Price-Macemon/Rochester Silo, Inc. The orders were placed pursuant to a sales contract between Industrial and Delton Demere, dated January 5, 1987. Industrial never had physical possession of the equipment and had no control over the equipment or its design. In fact, Industrial did not select the individual components of the ice-making equipment. Instead, the components were selected by Preston Davis[2] and the Demere family. In fact, as David McGowan, Industrial's representative, testified, the sale to Delton Demere was the first time Industrial had sold an ice storage bin manufactured by Price-Macemon. (R. Vol. 10, pp. 281-284, 312).

Installation of the ice plant began in the spring of 1987. Pursuant to the terms of the sales contract, the Demeres were

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2. Preston Davis selected the ice-making equipment and made the sale, placing the order through Industrial. (R. Vol. 7, p. 14). Preston Davis was not an authorized sales agent for Industrial, nor was he an employee. (R. Vol. 7, p. 8).

required to arrange for installation of the ice plant and for preparing the foundation. (R. Vol. 10, pp. 168-69). The ice storage bin was shipped directly from its manufacturer, Price-Macemon, to the site in Leeville. (R. Vol. 10, p. 291). Additionally, the manufacturer, Price-Macemon, supplied a supervisor to oversee the entire installation process and "make sure everything went the way they thought it should be." (Vol. 10, p. 237). Further, according to Damas Demere, the general manager of the ice plant, the representative of Price-Macemon was responsible for all safety devices. (R. Vol. 10, p. 199).

While the petitioner argues that Industrial should have supplied warning decals for placement on the ice storage bins, at no time prior to the accident, were limit switches or warning decals provided to Industrial by the manufacturer of the equipment. (Vol. 10, p. 303). In fact, Price-Macemon subsequently forwarded instructions for limit switches, limit switches themselves, safety decals, and instructions for locating the safety decals to Industrial on October 29, 1987, several months after the accident.

SUMMARY OF THE ARGUMENT

This Court should deny petitioner's Petition for Writ of Certiorari under Rule 10 of the Supreme Court Rules. The decision of the Fifth Circuit Court of Appeals applies Louisiana tort law and is not in conflict with the decisions of the Louisiana state courts. Further, the Fifth Circuit's opinion is not in conflict with decisions of this Court or of other federal circuit courts. Instead, the Fifth Circuit correctly applied the rules regarding summary judgment as established by this Court and developed by the circuit courts to affirm the trial court's summary judgment in favor of Industrial.

Further, the Fifth Circuit correctly applied Louisiana law which holds that a retail seller has no duty to warn of dangers which are open and obvious. While the petitioner argued that Louisiana

has rejected the open and obvious danger defense, that argument is unfounded. Further, petitioner confuses the burdens placed on a manufacturer and the test used to determine whether a product is defective with the burdens placed on a retail seller and the inquiry as to whether a duty to warn exists.

As the respondent argued in pre and post trial memoranda, in the Motion for Summary Judgment, and in its brief and reply brief to the Fifth Circuit, under Louisiana law, Industrial had no duty to warn Jack Kelley of the danger involved with the auger at issue since the danger was obvious. Therefore, this Court should refuse to exercise its supervisory review and deny petitioner's Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS, AFFIRMING SUMMARY JUDGMENT IN FAVOR OF INDUSTRIAL REFRIGERATED SYSTEMS, DOES NOT PRESENT ISSUES WARRANTING EXERCISE OF THIS COURT'S SUPERVISORY REVIEW SINCE THE DECISION IS NOT IN CONFLICT WITH THOSE OF OTHER CIRCUITS AND ACCURATELY APPLIES LOUISIANA LAW REGARDING THE DUTIES OF A RETAIL SELLER.

Under *Erie R.R. v. Tompkins*, 304 U.S. 64, 56 S. Ct. 817, 82 L. Ed. 1118 (1938), the district court and Fifth Circuit were obligated to apply "well-settled"[3] Louisiana law regarding the obligations of a *retail seller* where an individual is injured by the product sold.[4]

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3. *Kelley*, 992 F.2d at 1414.

4. Since the actual manufacturer of the ice-making equipment was (Cont'd)

Since this case involves the application of "well-settled" Louisiana tort law, this Court should decline to exercise its supervisory jurisdiction and should deny petitioner's Petition for Writ of Certiorari under Rule 10 of the Supreme Court Rules. As noted by this Court, certiorari is used mainly to resolve conflicts among circuit courts and state courts regarding the interpretation of federal law. *Braxton v. United States,* 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991).

The Fifth Circuit's decision in this case correctly applied Louisiana law. In addition, the decision is not in conflict with the Louisiana Supreme Court. Instead, the decision follows a long line of Louisiana cases, including those of the Louisiana Supreme Court, which relieve a retail seller of the duty to warn where the danger associated with use of a product is obvious.[5]

Also, since the applicable substantive law in this case is Louisiana tort law, the decision is not in conflict with those of other circuits. However, to persuade this Court to exercise its discretionary jurisdiction, the petitioner argues that the Fifth Circuit erroneously affirmed the use of summary judgment in a product liability case. Further, petitioner argues that the decision to

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(Cont'd)
bankrupt, at trial petitioner argued that Industrial should be treated as a manufacturer by claiming that Industrial was a "professional vendor." *See Chappuis v. Sears Roebuck & Co.,* 358 So. 2d 926, 930 (La. 1978). However, the jury concluded that Industrial should be treated as a *retail seller,* not as a manufacturer. Further, the district court granted a new trial on the sole issue of Industrial's liability as a *retail seller.* Thus, the issue of manufacturer's liability was not before the Fifth Circuit since that issue was not appealed by the petitioner.

5. *See Thornhill v. Black, Sivalls & Brison, Inc.,* 394 So. 2d 1189 (La. 1981); *Delanzo v. ABC Corp.,* 572 So. 2d 648 (La. App. 5th Cir. 1990); *American v. Duo Fast Dixie,* 367 So. 2d 415 (La. App. 4th Cir. 1979).

affirm the use of summary judgment is in conflict with decisions of this Court and other circuits.

That argument lacks merit. Instead, the Fifth Circuit correctly applied the guidelines developed by this Court and other federal courts in defining and applying the rules on summary judgment. *See* Section II, *infra.*

In addition, contrary to petitioner's argument, this case does not warrant consideration by this Court due to "societal" issues presented. While petitioner argues that affirming the decision in favor of Industrial will create a negative incentive for manufacturers,[6] the decision, limited to seller liability, does not affect a manufacturer's duty to develop a safe product. Instead, if the *manufacturer* of the equipment had been before the court, it is likely that it would have been liable for failing to include adequate safety devices.

Because the decision of the Fifth Circuit is in accordance with Louisiana tort law and does not abuse summary judgment procedure, this Court should refuse to exercise its discretionary review and deny petitioner's Petition for Writ of Certiorari. Further, while Mr. Kelley's death was indeed tragic, this case does not present issues of national concern sufficient to warrant granting petitioner's petition.

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6. *See* petitioner's Petition for Writ of Certiorari at p. 10.

II.

THE FIFTH CIRCUIT CORRECTLY AFFIRMED THE TRIAL COURT'S SUMMARY JUDGMENT IN FAVOR OF RESPONDENT, INDUSTRIAL REFRIGERATED SYSTEMS, SINCE, AS A MATTER OF LAW, INDUSTRIAL REFRIGERATED SYSTEMS DID NOT HAVE A DUTY TO WARN JACK KELLEY REGARDING THE POTENTIAL DANGER OF THE ICE MACHINE AT ISSUE SINCE ANY DANGER PRESENTED BY THE ICE MACHINE'S AUGER WAS OPEN AND OBVIOUS.

A. Both the District Court and the Court of Appeals Properly Used Summary Judgment in this Case.

While the Fifth Circuit has stated that summary judgment is not always appropriate in negligence or product liability cases, the court has recognized circumstances in which summary judgment might appropriately dispose of a negligence or product liability action. Specifically, the Fifth Circuit has instructed that summary judgment is appropriate where the resolution of the summary judgment motion turns upon *legal issues*, and not factual issues. *Trevino v. Yamaha Motor Corp.*, 882 F.2d 182, 184 (5th Cir. 1989).

The petitioner correctly argues that summary judgment may not be appropriate in a product liability case where the court is charged with determining whether a manufacturer created a product with a design defect since that inquiry requires a risk-utility balancing test. *See Davidson v. Stanadyne, Inc.*, 718 F. 2d 1334, 1339 (5th Cir. 1983) (applying Texas law). However, determining whether a retail seller is charged with the duty to warn, presents a wholly separate inquiry. Determining whether the duty to warn exists and defining it are *legal questions* which should be answered by the trial judge. *Harris v. Pizza Hut*, 455 So. 2d 1364, 1371 (La. 1984); *Putman v. Gulf States Utilities*, 588 So. 2d 1223, 1228 n. 5 (La. App. 1st Cir. 1991).

In answering the legal question presented, the Fifth Circuit accurately applied the standards regarding summary judgment as set forth by this Court. First, the Fifth Circuit noted that in reviewing the district court's grant of summary judgment, it should examine the record *de novo. Kelley,* 992 F.2d at 1413 (citing, *Walker v. Sears, Roebuck & Co.,* 853 F.2d 355, 358 (5th Cir. 1988)). Also, the court cited the well-established rule that summary judgment is proper only if the record discloses that there is no genuine issue as to any material fact and that Industrial is entitled to judgment as a matter of law. *Id.* (citing, Fed. R. Civ. Proc. 56(c)). Further, the court examined the record and viewed the evidence and all justifiable inferences drawn from that evidence in the light most favorable to petitioner. *Id.* (citing, *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S. Ct. 2501, 2513-14, 91 L. Ed. 2d 202 (1986); *Reid v. State Farm Mut. Auto Ins. Co.,* 784 F.2d 577, 578 (5th Cir. 1986)). Thus, the court found that if the record, viewed in the light most favorable to petitioner, could not lead a rational trier of fact to find for petitioner, there was no genuine issue for trial, and summary judgment was proper. *Id.* (citing, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 578, 106 S. Ct. 1348, 1351, 89 L. Ed. 2d 538 (1986); *Lavespere v. Niagara Mach. & Tool Works,* 910 F.2d 167, 178 (5th Cir. 1990)).

Further, the Fifth Circuit correctly noted that Industrial had the burden of informing the court of the basis for its motion and in identifying the pleadings and other evidence which it believed demonstrated the absence of a genuine issue of material fact. *Id.* (citing, *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986); *Lavespere,* 910 F.2d at 178)).

Contrary to petitioner's representation in its Petition for Certiorari, Industrial did not merely present the single Affidavit of David McGowan in support of its motion. Instead, Industrial argued that it had no legal duty to warn Jack Kelley of the auger's

obvious danger and, in support, pointed the court to the trial testimony of David McGowan, Damas Demere, Delton Demere, David Easley, and Steven Fillimich in support of the contention that the auger's danger was obvious to the ordinary user. (R. 1684-85). Industrial further cited the trial court to extensive case law regarding the duty to warn and to cases holding that the danger of an auger is obvious. *Thornhill,* 385 So. 2d at 338; *Melton v. Deere & Co.,* 887 F.2d 1241 (5th Cir. 1989).

Then, as the Fifth Circuit instructed, it became incumbent on the petitioner to submit affidavits or refer to the record to designate specific facts showing that there was a genuine issue for trial. *Id.* (citing, *Lavespere,* 910 F.2d at 178).

In opposing the motion for summary judgment, the petitioner failed to make any references to the record other than to cite the trial judge's earlier rulings. Instead, petitioner argued that the "law of the case doctrine" precluded summary judgment. Further, petitioner argued that in his earlier rulings, the district judge found that summary judgment was inappropriate. (*See* Petitioner's Appendix I, A-81-87).

In rejecting petitioner's arguments, the trial court noted that the law of the case doctrine did not apply since no decision had been rendered by an appellate court. (R. 1577). Additionally, the trial judge instructed that Rule 54(b) of the Federal Rules of Civil Procedure permitted him to revise his previous rulings. Also, the trial court noted that the respondent's motion for summary judgment was presented in a different context since the jury found that Industrial was not a manufacturer, but was a retail seller. (R. 1578-79). In short, the court found "no support in the record (*and plaintiff's counsel presents none*) for its previous position that . . . the auger did not present an open and obvious danger as a matter of law." (R. 1579-80) (footnote omitted and emphasis added). Thus, petitioner's counsel failed to raise a triable issue of fact. (R. 1580).

After requiring Industrial to show that there was no issue of fact upon which a reasonable jury could rule in favor of petitioner, the Fifth Circuit correctly shifted the burden to the petitioner to show specific facts in the record which would support the conclusion that a genuine issue existed for trial. Since the principles regarding summary judgment and the burdens assigned to each party were correctly set forth by the court, the Fifth Circuit did not contradict the decisions of this Court or other circuit courts. Further, since the issue before the court was a legal one, *i.e.*, whether a duty existed, summary judgment was appropriate.

B. As a Retail Seller, Industrial Had No Duty to Warn Jack Kelley of the Auger's Obvious Danger.

The Fifth Circuit correctly noted that, under Louisiana law, a manufacturer of a product that is defective or unreasonably dangerous may be held strictly liable. *Kelley*, 992 F.2d at 1413 (citing, *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 113 (La. 1986)). However, in contrast, the non-manufacturer seller of a product may be held liable only for its negligent failure to warn consumers of the dangerous propensities of the product it sells.[7] Louisiana courts have consistently held that a seller's duty to warn extends only to dangers which are not obvious. The seller has no duty to warn of dangers of which the user is or should be aware.[8]

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7. While petitioner complains that the Fifth Circuit cited *Hopper v. Crown*, 555 So. 2d 46 (La. App. 1st Cir. 1989), *rev'd*, 558 So. 2d 1117 (La. 1990), the rule regarding seller's liability is firmly established. La. Civ. Code art. 2545; *Spillers v. Montgomery Ward & Co.*, 294 So. 2d 803 (La. 1974); *Nelton v. Astro-Lounger Manufacturing Co.*, 542 So. 2d 128 (La. App. 1st Cir. 1989); *Harris*, 428 So. 2d at 1043.

8. *Delanzo*, 572 So. 2d at 651; *Hopper*, 555 So. 2d at 49; *American*, 367 So. 2d at 417; *see also, Halphen*, 484 So. 2d at 155 (limiting the duty of a *manufacturer* to warn of dangers which are not within the knowledge of or obvious to the user); *Home Ins. Co. v. National Tea Co.*, 577 So. 2d 65, 73-74 (La. App. 1st Cir. 1990), *aff'd in part, rev'd in part on other grounds*, 588 So. 2d 361

(Cont'd)

In arguing that Louisiana has rejected the open and obvious danger defense, petitioner misstates Louisiana law.[9] In fact, when the legislature codified Louisiana product liability law in the Louisiana Product Liability Act, he legislature retained the defense and instructed that a manufacturer is not required to provide a warning about a product where the user already knows or reasonably should know of the danger. La. R.S. 9:2800.57(B)(2) (West 1991)[10].

Additionally, while petitioner argues that the defense was eliminated when the Louisiana Supreme Court reversed *Hopper v. Crown*, the concurring opinion of Justice Lemmon did, in fact, recognize the defense. In the only opinion provided, Justice Lemmon stated that "the seller might still prevail if the defect was obvious to the ordinary user." *Hopper v. Crown*, 558 So. 2d 1117 (La. 1990) (Lemmon, J. concurring).

(Cont'd)
(La. 1991); *LeBleu v. Home Light Div. of Textron, Inc.*, 509 So. 2d 563, 565 (La. App. 3d Cir. 1987); *Decote v. Liberty Mut. Ins. Co.*, 451 So. 2d 1211, 1213 (La. App. 4th Cir. 1984), *writ denied*, 457 So. 2d 15 (La. 1984); *Lovell v. Earl Grissmer Co.*, 422 So. 2d 1344, 1350 (La. App. 1st Cir. 1982), *writ denied*, 427 So. 2d 871 (La. 1983); *Thornhill*, 385 So. 2d at 338.

9. In this diversity action, it is irrelevant if Colorado and Mississippi have rejected the defense. Louisiana law applies. Nonetheless, petitioner's interpretation of *Sperry-New Holland v. Prestage*, 617 So. 2d 248 (Miss. 1993) is misleading. In *Sperry*, the Mississippi Supreme Court discussed the potential strict liability of a manufacturer and determined that a risk-utility test should apply. Louisiana has consistently applied a risk-utility test in determining whether a manufacturer's product is defective. *Halphen*, 484 So. 2d at 115. However, the duty to warn inquiry as it relates to a retail seller is completely distinct.

10. The LPLA became effective on September 1, 1988. La. R.S. 9:2800.51, *et seq.* (West 1991).

Further, the Louisiana courts have continued to apply the defense as recently as July 2, 1993. In *Johnson v. Hartford Ins. Co.*, 623 So. 2d 35 (La. App. 1st Cir. 1993), the First Circuit affirmed a directed verdict in favor of an automobile manufacturer in *Johnson*, the petitioner was injured when he placed his hand into the wheel well of a car with the engine running. *Id.* at 36. In finding in favor of General Motors, the court noted that "[i]t is well established, however, the duty to warn does not include dangers which are obvious to the ordinary user." *Id.* at 37 (citing, *Winterrowd v. Travelers Indem. Co.*, 462 So. 2d 639, 642 (La. 1985)).

Petitioner also erroneously relies on *Putman v. Gulf States Utilities*, 588 So. 2d 1223 (La. App. 1st Cir. 1991) for the proposition that Louisiana "simply does not recognize the 'open and obvious' danger rule as a bar."[11] Instead, *Putman* actually supports Industrial's position. In *Putman*, the First Circuit affirmed summary judgment in favor of the defendant, finding that the defendant had no duty to warn of the obvious danger associated with bringing a mop in contact with high voltage electrical power lines. *Id.* at 1229.

While it is true that the open and obvious danger rule is not a bar to a strict liability claim against a manufacturer, the open and obvious danger rule does apply to eliminate the duty to warn. The

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11. *See* petitioner's petition at p. 18. While Louisiana recognizes comparative fault as opposed to contributory negligence, that concept is not in conflict with holding that a seller has no duty to warn of a danger which should be obvious to an ordinary user. In assigning comparative fault, the trier of fact would focus on Mr. Kelley's actions or inactions. In defining a legal duty, the court should focus on the product at issue and any danger associated with it. Then, the court determines whether the danger should be obvious to an ordinary user. If so, the defendant has no duty to warn. Further, Louisiana has continuously applied the open and obvious danger rule after it adopted the doctrine of comparative fault in 1979. *See* Note 8.

inquiries are distinct. A manufacturer can be held liable in a product liability case under several theories — where a product is unreasonably dangerous per se (if the danger-in-fact outweighs the utility of the product), where a product is unreasonably dangerous in construction, or where the manufacturer fails to provide an adequate warning of a danger inherent in the normal use of the product. *Halphen*, 484 So. 2d at 114-15. In Louisiana, the open and obvious danger rule comes into play only under the third theory of recovery, failure to warn. *Id.* at 115. A manufacturer has a duty to warn only of dangers "not within the knowledge of or obvious to the ordinary user." *Id.* Since a retail seller's potential liability is limited to the duty to warn, the open and obvious danger rule applies.

In short, the Fifth Circuit correctly applied Louisiana law in answering the legal question of whether a duty to warn existed. The court correctly answered the question, finding that the danger of the auger was obvious. In doing so, the Fifth Circuit cited its earlier opinion in *Melton v. Deere & Co.*, where the court found that the danger of an auger was common sense. *Melton*, 887 F.2d at 1244.[12] Further, the court found that after a careful review of the record, viewing the testimony in the light most favorable to the plaintiff, no rational trier of fact could find in favor of the plaintiff on the issue of the auger's danger. *Kelley*, 992 F.2d at 1418. Because the record did not disclose a genuine issue of fact regarding the obvious nature of the auger's danger, summary judgment was appropriate. Industrial had no duty to warn.

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12. *Melton* was cited for the proposition that the danger presented by an auger is common sense. It is irrelevant that Mississippi embraced the risk-utility analysis after *Melton* was decided. That analysis does not affect the duty to warn inquiry.

CONCLUSION

Since the case presents issues of well-settled Louisiana tort law, this Court should refuse to exercise its discretionary jurisdiction. The Fifth Circuit correctly applied the principles regarding summary judgment as developed by this Court and the other circuits. In doing so, the court reviewed a consistent line of Louisiana cases and found for Industrial. That decision should not be disturbed.

Respectfully submitted,

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